United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To be Argued by J. Daniel Sagarin

77-6074

B

In The

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

P/S

No. 77-6074

APPEAL

FROM THE

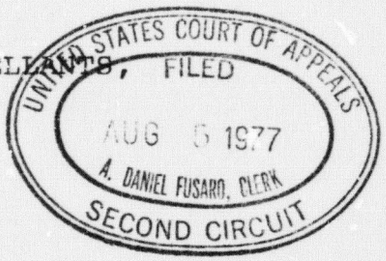
UNITED STATES DISTRICT COURT

for the

DISTRICT OF CONNECTICUT

WESTPORT TAXI SERVICE, INC.,
MICHAEL AND ANTHONY GILBERTIE,

PLAINTIFFS-APPELLANTS,



VS.

WILLIAM T. COLEMAN, JR.,
SECRETARY OF TRANSPORTATION,
WESTPORT TRANSIT DISTRICT,
PAUL R. GREEN, JOHN E. MEYERS,
AND RICHARD BRADLEY

DEFENDANTS-APPELLEES

BRIEF OF DEFENDANTS PAUL R. GREEN, JOHN E. MEYERS, AND RICHARD BRADLEY, WESTPORT TRANSIT DISTRICT

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49 U.S.C. 1602(d)

(d) Any application for a grant or loan under this Act to finance the acquisition, construction, reconstruction, or improvement of facilities or equipment which will substantially affect a community or its mass transportation service shall include a certification that the applicant—

(1) has afforded an adequate opportunity for public hearings pursuant to adequate prior notice, and has held such hearings unless no one with a significant economic, social, or environmental interest in the matter requests a hearing;

(2) has considered the economic and social effects of the project and its impact on the environment; and

(3) has found that the project is consistent with official plans for the comprehensive development of the urban areas.[13]

Notice of any hearings under this subsection shall include a concise statement of the proposed project, and shall be published in a newspaper of general circulation in the geographic area to be served. If hearings have been held, a copy of the transcript of the hearings shall be submitted with the application.[14]

49 U.S.C. 1602(e)

(c) [15] No financial assistance shall be provided under this Act to any State or local public body or agency thereof for the purpose, directly or indirectly, of acquiring any interest in, or purchasing any facilities or other property of a private mass transportation company, or for the purpose of constructing, improving, or reconstructing any facilities or other property acquired (after the date of the enactment of this Act) from any such company, or for the purpose of providing by contract or otherwise for the operation of mass transportation facilities or equipment in competition with, or supplementary to, the service provided by an existing mass transportation company, unless (1) the Secretary finds [16] that such assistance is essential to a program, proposed or under active preparation, for a unified or officially coordinated urban transportation system as part of the comprehensively planned development of the urban area, (2) the Secretary finds that such program, to the maximum extent feasible, provides for the participation of private mass transportation companies,[17] (3) just and adequate compensation will be paid to such companies for acquisition of their franchises or property to the extent required by applicable State or local laws,[18] and (4) the Secretary of Labor certifies that such assistance complies with the requirements of section 13(c) of this Act.

49 U.S.C. 1605

Research, Development, and Demonstration Projects

SECTION 6. The Secretary is authorized to undertake research, development, and demonstration projects in all phases of urban mass transportation (including the development, testing, and demonstration of new facilities, equipment, techniques, and methods) which he determines will assist in the reduction of urban transportation needs, the improvement of mass transportation service, or the contribution of such service toward meeting total urban transportation needs at minimum cost. He may undertake such projects independently or by grant or [46] contract (including working agreements with other Federal departments and agencies). In carrying out the provisions of this section, the Secretary is authorized to request and receive such information or data as he deems appropriate from public or private sources.[47]

§ 7-273b. Legislative finding. Definitions. Formation of district. Withdrawal

(a) It is hereby found and declared that the development, maintenance and improvement of systems for the transportation of people and goods within the state, and particularly within the metropolitan areas of the state, by rail, motor carrier or other means of land transportation are essential for the welfare of the citizens of the state and for the development of the state's resources, commerce and industry, that the development and maintenance of modern, efficient and adequate systems of mass transportation are required; that private enterprise lacks financial or other resources necessary to provide such systems of mass transportation; and, that the formation and operation of transit districts with the powers enumerated in this chapter are thus a public necessity.

(b) As used in this chapter "transit facilities", "transit services" and "transit system" mean street railway, motorbus, minibus, tramline, monorail, rapid transit or other land transportation systems for the mass movement of persons and goods between locations within and between municipalities, including real property and interests therein, and equipment and facilities incident to the provision, operation, administration and maintenance of such transit system.

(c) Nothing in this chapter shall prohibit the continuation of any transit district formed under any special act.

(d) Any town, city or borough may, by itself or in cooperation with one or more other municipalities, form a transit district, in the manner and for the purposes hereinafter provided. The district shall be a body corporate and politic, and may sue and be sued, plead and be impleaded, hold and convey real or personal estate, adopt and alter a common seal, borrow on the faith and credit of the district for its purposes under this chapter, as amended by this act, and, in addition to the powers authorized by this chapter or any other chapter of the general statutes, shall have such other powers as are necessary or incident to carrying out the powers and purposes of this chapter.

(e) The legislative body of any municipality may vote to establish a transit district or to join with any one or more municipalities to form such a district. Any municipality may at any time be included in the district if the legislative body thereof so votes and if accepted by a majority vote of the directors of the transit district. The district may contract with any town to supply transit service therein. It may also provide charter service

(f) Any municipality included in the district may withdraw therefrom if the legislative body thereof votes to do so. In such case the board of directors of the district, including the members chosen from the withdrawing municipality, shall determine the share of the district's expenses and obligations remaining due from the municipality. The municipality shall pay or secure such amount to the district before such withdrawal shall become effective.

(g) Whenever any transit district is formed under the provisions of this chapter, no provision of chapters 277, 281, 285, 286, 287 and 288 shall apply to the operation of transit systems by such district.

§ 7-273d. Assumption of public utilities commission powers relative to transit system within district. Appeals

Upon written notice to the public utilities control authority, to the chief executive officer of a private transit system, and to the elected chief executive officer of each municipality composing tthe district, the district, by its board of directors, may assume all powers of the public utilities control authority to regulate and supervise the operation of any such transit system within the district, provided that such transit system would be subject to the supervision of the public utilities control authority except for this section. Upon assuming such supervision the district, by its board of directors, shall establish passenger fares and any other rates to be charged and shall establish service standards, may order abandonment of uneconomic routes and shall exercise all powers of regulation and supervision over such transit system as are conferred on the public utilities control authority by title 16, in the same manner and under the same standards are established by said title 16. Any company, town, city, borough, corporation or person aggrieved by any order, authorization or decision of the board of directors, except an order, authorization or decision approving the taking of land, in any matter to which he or it was or ought to have been made a party, may appeal therefrom to the public utilities control authority within thirty days after the filing of such order, authorization or decision. The party so appealing shall give bond to the state, with sufficient surety, for the benefit of the adverse party, in such sum as the board of directors fix, to pay all costs in case he or it fails to sustain such appeal. To the extent applicable, such appeal shall conform to the standards and procedure for appeals to the courts from decisions of the public utilities control authority as provided in sections 16-35 through 16-39, inclusive. Where the public utilities control authority determines that the order, authorization or decision of the transit district would affect statewide transportation policy adversely, such order, authorization or decision may be modified or overruled. The district may use any grants, loans or other revenues for subsidies to any transit system operating under private ownership within the district in order to continue the operation of uneconomic routes. Subsidies may be provided for that portion of such uneconomic routes which operate outside the transit district but which are integrated into the service provided in the district.
(1973, P.A. 73-2, § 9, eff. Feb. 16, 1973; 1975, P.A. 75-486, § 24, eff. Dec. 1,

§ 7–273e. Acquisition or establishment of transit system by district. Eminent domain

(a) If the directors deem it necessary to preserve or to develop a transit system, the district may establish, operate and maintain a transit system within the district or between the district and any municipality contiguous with its service area with which it contracts to furnish transit service, and for this purpose may establish a new system, or may acquire all or a portion of the property and franchises of any company or companies operating a transit service in the district, including that portion of the property and franchises used for operation within the district and also that portion of the property and franchises which is used outside the district but which is integrated into the service provided in the district. Thereafter the district may contract, after competitive bidding, for the operation of all or any portion of the system by private management, under suitable incentives. The district shall fix the terms and conditions upon which transit services shall be provided, whether operated directly by the district or indirectly by contract, including the fixing of passenger fares and any other charges to be charged. The district shall, for its purposes under this section, so far as applicable, have the authority conferred on the public utilities control authority by the general statutes as applied to local transit.

(b) In order to insure the continuance of adequate transit services when it appears that the holder of the franchise is or will be incapable of continuing to offer satisfactory service to meet present or future public passenger transportation requirements and it is improbable that such franchise will be sought by any other private concern, the public utilities control authority, on its own initiative, may or, on request of the transit district or the legislative body of one or more municipalities in the area served, shall fix a time and place for a hearing as to whether such franchise is suitable for acquisition by a transit district. Said authority shall give written notice of such hearing to the board of selectmen of each town, or in the case of cities and boroughs to the chief executive of each, within the area not less than fourteen days prior to such hearing, and shall cause to be published twice, not more than fourteen nor less than seven days prior to such hearing, notice of such hearing in a newspaper or newspapers having a substantial circulation in each municipality within such area. Suitability of a franchise for acquisition by a transt district shall be determined from the following considerations:

(1) That public convenience and necessity require the continuance of transit service within the area,

(2) that the present franchise holder is or will be incapable of continuing to offer satisfactory service,

(3) that it is improbable that such franchise will be sought by a private concern and

(4) that continuance of transit service may require the operation of such service by a transit district.

After a public hearing thereon and consideration of the above-mentioned factors, the public utilities control authority may declare such franchise suitable for acquisition by a transit district, provided such declaration shall not affect the authority of the municipalities in the area to establish such a district. Ability to offer satisfactory service shall be based upon the financial stability of the franchise holder as determined from past, current and projected net income and from an estimate of financial ability to meet future public passenger transportation requirements in the area. The public utilities control authority may make periodic inspections of transit system franchise holders to determine the financial stability of each and for this purpose may examine the books, accounts and other pertinent documents of such franchise holders and shall have the power to compel the attendance of witnesses and the production of books, accounts and other pertinent documents by the issuance of a subpoena.

(c) A transit district shall have the power to acquire real property and interests and rights in real property by eminent domain in the name of the transit district for the purposes of the transit district subject to the prior approval of the legislative body or bodies of the municipality or municipalities in which the real property is located. The owner shall be paid by the transit district for all damages. Where the transit district and the owner of such property cannot agree upon the amount to be paid to the owner for any property thus taken, the transit district shall proceed in the same manner specified for redevelopment agencies in accordance with sections 8–129 to 8–133, inclusive. Where the public utilities control authority has determined that a franchise is suitable for acquisition pursuant to subsection (b) of this section, the transit district shall have the power to acquire by eminent domain

all or any part of the franchise and of the holder's transit system, including the holder's real estate or interests therein, personal property, and funds under the control or held for the use of or the benefit of such holder. Where the transit district and the holder of such franchise and property cannot agree upon the amount to be paid to the holder for any franchise or property thus taken, the transit district shall proceed in the same manner specified for redevelopment agencies in accordance with sections 8–129 to 8–133, inclusive.

(1975, P.A. 75–486, § 25, eff. Dec. 1, 1975.)

STATEMENT OF THE CASE

This action was initiated on December 6, 1976 when the plaintiffs filed a complaint, a Motion for Temporary Restraining Order and a Motion for Preliminary Injunction. At a chambers conference on December 9, 1976 plaintiff's Motion for a Temporary Restraining Order was denied.

On January 11, 1977 a hearing was held on the plaintiff's Motion for a Temporary Injunction. Pursuant to Fed. Rule Civ. Pro.65(a) that hearing was also to be a hearing on the merits.

When no decision was forthcoming the defendants went ahead with the program and the plaintiffs filed a second Motion for a Temporary Restraining Order on March 29, 1977. It was denied by Judge Newman in open Court after a chambers conference.

Ruling on Motions was filed on April 13, 1976 denying all relief plaintiffs sought. Judgment in favor of defendant was entered in the district court on April 18, 1976. Plaintiffs filed a timely Notice of Appeal on May 2, 1977.

STATEMENT OF FACTS

Westport Transit District (WTD) is a local governmental body organized under Section 7-273b of the Connecticut General Statutes. Its statutory obligations are to organize, coordinate and provide mass transit programs in the Westport area. Under Connecticut law local trans : districts may acquire real and personal property, borrow funds, locally assume the powers of the Public Utilities Control Authority (PUCA) and acquire private transportation franchises by eminent domain. (Connecticut General Statutes §§7-273b, 7-273d, 7-273e). To date WTD has not superceded the PUCA locally nor started to acquire franchises by eminent domain.

Paul Green and John E. Meyers are directors of the Westport Transit District. Richard Bradley is Executive Director of the Westport Transit District.

WTD has been one of the more successful and innovative suburban transit programs in Connecticut, running a fixed rate "minnybus" operation since August of 1974. (M.G. 39, R.B. 2). The "minnybus" developed a large ridership in the Westport area. In fact, after 5:30 p.m. when commuter trains arrive, the entire fleet must be diverted from downtown Westport to the railroad station to carry the load (R.B. 66).

Given the success of the fixed rate bus program, WTD early in 1976 applied to the Urban Mass Transportation Administration for a grant under Section 6 of the Urban Mass Transportation Act of 1964. (49 USC §1605).

The program's goal is to demonstrate the practicality of certain types of paratransit services and to coordinate the operations of existing transit operators (R.B. 59-70).

Michael Gilbertie and Anthony Gilbertie are the officers and stockholders of the Westport Taxi Company. Plaintiff, Westport Taxi Company, is a local taxi company. It operates under PUCA Certificate of Public Convenience and Necessity No. 356 (M.G. 48). Under the certificate, Westport Taxi offers primarily single rider premium ride service. It may carry a second passenger to a different destination from the first passenger only with the consent of the first passenger. (PUCA Regs. 16-316-15). Plaintiffs claimed much of their business was share service but it is not clear that plaintiffs in fact comply with the "consent" requirement.

Westport Taxi is one of two private taxi companies operating in Westport. The other is Teddy's Taxi. The two companies have been involved in fierce competition including a dispute over the right to pick up fares at the railroad station. (M.G. 70-71).

Westport Taxi has been a marginal operation for a number of years, showing operating losses since 1969 (M.G. 46). Its fleet consists of five taxis, the newest of which is a 1973

Dodge which was acquired used in 1974 (M.G. 38-39). In 1968 the Certificate of Public Convenience and Necessity was transferred to the plaintiffs Michael and Anthony Gilbertie from their father. A value of $7,810.26 was assigned to the franchise and a value of $8,744.23 was assigned to good will (M.G. 33). In 1972, Gilberties attempted to sell the business for $55,000. Despite a brokerage listing, they were unable to find a buyer for the business (M.G. 88).

Starting in 1974, both Westport Taxi and Teddy's Taxi had met with the officials of WTD on the problems of the taxi companies (R.B. 71-72). The study by ECI Systems Inc. (App. P. 7, B 57) upon which WTD's subsequent grant proposal was based grew out of these discussions (R.B.72).

On January 31, 1976, WTD submitted a proposal for a Service and Methods Demonstration Grant to the Urban Mass Transportation Administration (UMTA) (App B-72). (The proposal was amended on April 26, 1976 when the Town of Weston declined to participate (Id. B-73). UMTA approved the grant by letter of approval on June 29, 1976 and a letter of grant dated August 4, 1976 (App. P. B -196). The contract which provides the funding for the project was signed on December 16, 1976 (App. P.B -207).

According to the contract the major elements of the project are:

(1) A shared ride service utilizing approximately six twelve-passenger vans.

(2) Special market services for groups such as the handicapped and elderly.

(3) Transportation brokerage through which all transit and paratransit services in the area would be co-ordinated.

(4) Supplementary fixed rate service. (App. P. B-209-210). The services provided under the demonstration grant are different from those provided by the plaintiff. No "premium ride" (single rider) service may be provided under the terms of the grant contract or by UMTA policy (App. P. B-207), R.B. 18, 21-22). The "shared-ride" service provided by WTD contemplates several riders being aboard in the vehicle before it can leave on its run. (R.B. 35-36). As stated above, the plaintiffs, under PUCA regulation, may carry a second passenger only with the consent of the first. (R.B. 10, M.G. 48-49).

It was contemplated by WTD that the operation of the program would be subcontracted to a private paratransit company (R.B. 49-50, App. P. B-199). The two Westport taxi

operators were favored candidates for the contract and lengthy negotiations took place on this topic (M.G. 56-60). None of WTD's many proposals for participation was accepted by Westport Taxi. The proposals included the operation of the new program as a joint partnership (R.B. 49), an offer to Westport Taxi of a management fee, a dispatching fee and a loan to buy out Teddy's (M.G. 58), a merger proposed between the two companies (M.G. 59), and a proposal that one company buy out the other (M.G. 60). If the program ceased after the two year demonstration period that new equipment was to be leased to participants for a dollar a year (M.G. 61). Nothing in any plan required the termination of either taxi business during the demonstration period.

Even after negotiations between plaintiffs and WTD failed, plaintiffs were afforded an opportunity to bid for participation in the program (M.G. 62). All bids were to be submitted by December 14, 1976. WTD nonethless sua sponte gave the plaintiffs a special one week extension (M.G. 63). Westport Taxi did not submit a bid. Among the bids received was a joint bid by Teddy's and a local school bus operator. After its acceptance by WTD, plaintiffs were again offered a chance to participate in the project by taking the bus operator's place. They chose not to. Thus, they were given a fair and timely opportunity to participate in the project.

The project is currently operating with vehicles, equipment, and funds from the grant. Plaintiff's competitors are participating.

ARGUMENT

I. THE DISTRICT COURT WAS CORRECT IN FINDING THAT THERE WAS NO UNCONSTITUTIONAL TAKING OF THE PLAINTIFF'S PROPERTY.

Plaintiffs advance two bases for this claim: (1) right to be free from publicly funded competition; (2) a right to compensation under Connecticut law. The district court abstained from ruling on the state law issue.

A. Introduction

The gravamen of the complaint is that defendant's proposed operation during a two year demonstration project of a shared ride service is a taking for which they are constitutionally entitled to compensation. Their apparent claim is one of entitlement to freedom from competition with a public agency. Nothing in the Connecticut Statutes or PUCA Regulations gives plaintiffs an exclusive competition-free territory or guarantees a prescribed level of competition. The statutes and regulations mandate a concern for public safety and convenience. They do not ensure profitability of taxi operators.

1. Plaintiffs Have No Constitutional or Statutory Right to Be Free From Publicly Funded Competition.

Plaintiffs claim the district court erred in finding that there is no right to be free of publicly funded

competition. No constitutional or statutory right of the plaintiffs was found to be violated by the demonstration program.

The Supreme Court of the United States has held, in cases covering a time span of over seventy years, that competition between private enterprise and a governmental entity in providing public service does not constitute a taking or damaging, and is not actionable even where the privately owned service may thereby be injured or destroyed.

In United Railroads of San Francisco v. San Francisco, 249, U.S. 517, (1919) the City of San Francisco planned to construct a municipal street railway on Market Street, paralleling and operating in direct competition with plaintiff's street railway tracks. Justice Holmes expressing the opinion of the Court, stated:

> "Of course, so far as the harm to the plaintiff is an inevitable consequence of the city's doing, what the plaintiff's franchise did not make it unlawful for the city to do, the infliction of that harm is not a taking of the plaintiff's property that requires a resort of eminent domain."

United Railroads of San Francisco, supra at 521. In Knoxville Water Company v. Knoxville, 200 U.S. 22, (1906) the Supreme Court considered a suit by a private water company which had been given a monopoly as against other private concerns, charging that the construction

of a competitive system by the municipality was unlawful. The Court examined the grant to the private company, and failing to find a clear expression of an obligation on the part of the city not to establish and maintain its own water works, held that the city was not prohibited from doing so.

In Alabama Power Company v. Ickes, 302 U.S. 464 (1937), the United States Supreme Court rejected a claim by a privately owned power company against the Federal Administrator of Public Works challenging the validity of loan and grant agreements whereby four municipalities then served by the plaintiff would receive federal funds to help finance publicly operated electrical distribution systems. The court held:

> The claim that petitioner will be injured, perhaps ruined, by the competition of the municipalities... presents a clear case of damnum absque injuria. Stated in other words, the municipalities have the right under state law, to engage in the business in competition with petitioner, since it has been given no exclusive franchise. If its business be curtailed or destroyed by the operations of the municipalities, it will be lawful competition from which no legal wrong results.

Alabama Power Company v. Ickes, supra at 479-480.

In the case of Tennessee Electric Power Company v. TVA, 306 U.S. 118 (1939) (implicitly overruled in part on other grounds in Association of Data Processing Organizations

v. Camp, 397 U.S. 150) (1970) the appellants claimed that the TVA, by competing with them in the sale of electricity, was destroying their property without right. The Court stated:

> Local franchises while having elements of the property, confer no contractual or property rights to be free of competition, either from individuals, other public utility corporations, or the state or municipality granting the franchise.
>
> Tennessee Electric Power Company v. TVA, supra, at 139.

An extensive annotation of the subject of competition by the grantor of non-exclusive franchise as violation of the constitutional rights of the franchise holder, was summarized as follows:

> While doubtless each case, in view of the language of the particular grant and the related statutes bearing upon questions of contract right, is to be disposed of on its facts, in no case thus far decided has the holder of a franchise, which was not in its terms exclusive, succeeded in establishing that mere competition by the grantor was violation of any constitution right.
>
> 114 ALR 192, at 194.

In South Suburban Safeway Lines, Inc. v. City of Chicago, 415 F. 2d 535, 537 (7th Cir. 1969), a public transit authority was going into competition with a private bus line. The District Court examined the bus company's Certificate of Public Convenience and Necessity and the

statutory powers of the Transit Authority and concluded that the bus company had no legal right to be free of competition from the Transit Authority.

This rule has been applied in several UMTA cases holding that private mass transit operators (assuming plaintiffs to be private mass transit carriers) are not entitled to damages due to competition with UMTA-funded programs. In Hladek v. City of Merced (No. 2882, Fifth Appellate District Cal. Court of Appeals 1976) direct competition between a private dial-a-ride service and an UMTA-funded municipal program was not compensable. Similarly in Sequoia Stages v. Golden Gate Bridge, Highway and Transportation District (No. 661-304 Sup. Ct. San Francisco, 1974) a public bus company aided by UMTA was allowed to compete with a private bus company. Finally, in Masao Kon v. City of Ann Arbor (No. 12748 Mich. Court of Appeals, 1972) competition between a public dial-a-ride service and a private taxi company was held to be lawful.

Competition by government funded or created enterprises has been enjoined only when the legislation creating the public authority expressly forbids such competition. Hardin v. Kentucky Utilities, 390 U.S. 1 (1968). Hardin, relied upon by plaintiffs, arose when the Tennessee Valley Authority

sought to provide electric service to an area which its enabling statute had allocated to private utilities. The Supreme Court held that the TVA could service those areas because of the explicit statutory provision. 390 U.S. at 6.

2. Plaintiffs Have No Federal Statutory Right

Plaintiffs claim Congressional intent to grant them compensation rights is expressed in 49 U.S.C. §1602(e) and §1603. Those sections encourage "to the maximum extent feasible" the participation of private enterprise and to compensate private mass transporation companies "for acquisition of their franchises or property to the extent required by applicable state or local laws". The District Court found that the defendants followed this policy[1/]. The District Court found that the Transit District not only held public hearings on the project but made every effort to encourage the plaintiffs to bid

1/ The District Court held that §1602(e) findings are not required for demonstration grants under §1605 and that substantial compliance with statutory policy is all that is required in this context. The defendants contended and still contend that the requisite findings were made by UMTA in its memorandum recommending approval and the grant application introduced as App. P. B-196.

on participation in the project. Lengthy negotiations were held with the plaintiffs on possible roles they could play in the demonstration program. (Ruling p. 12). Ultimately the plaintiffs refused to participate. (See Statement of Facts, supra p. 6). The fact that negotiations were unsuccessful does not mean that there has been a statutory violation. All the statute requires is encouragement of participation "to the maximum extent feasible". As Judge Newman stated, they may not "write their own ticket". (Ruling p. 12). Further, since no franchise or property interest has been acquired to trigger a duty to compensate §1602(e) (3) has not been violated.2/

2/ Defendants at the District Court raised the issue of whether the plaintiffs had standing to sue under the Act. Under the rule of Association of Data Processing Organizations v. Camp, 397 U.S. 150 (1970) the defendants contended that the plaintiffs had not sustained an injury in fact nor were within the zone of interests protected by the Act. Defendants argued that plaintiffs were not a "private mass transportation company" within the meaning of the Act. Judge Newman found that the plaintiffs did have standing to sue as being "arguably within the zone of interests Congress intended to protect" (Ruling on Motions p. 4). He did not rule on the substantive question of whether the plaintiffs were for purposes other than standing a private mass transportation company". That finding was necessary as it was held that 1602(e) was inapplicable to demonstration projects. We still believe they lack standing. (See lower court argument at appendix B).

II. THE DISTRICT COURT WAS CORRECT IN ABSTAINING FROM RULING ON THE PLAINTIFF'S STATE LAW CLAIMS

Plaintiffs argued that their franchise from the PUCA assures them immunity from further competition unless there is a determination by the PUCA that additional service is required by public convenience and necessity. See Conn. Gen. Stat. §16-320. Plaintiffs also contend that the competition of the demonstration program amounts to a taking of their franchise. The district court held that this issue was a state law question inappropriate for resolution in the federal courts. Cf. Alabama Public Service Comm'n v. Southern Ry., 341 U.S. 341 (1951).

The district court was correct. (1) Assuming, arguendo, a compensable taking did occur, the remedy is damages, not an injunction; (2) whether the plaintiffs are entitled to be free of competition of the sort the transit district proposes is a substantial unresolved state law question.

The remedy for an compensable taking is compensation, not an injunction to bar the competitive service. Joslin Mfg. Co. v. City of Providence, 262 U.S. 668 (1923). As the district court noted, there is no indication that reverse condemnation proceedings were unavailable to the plaintiffs. (Ruling p. 13). Although the taking of a public franchise may be compensable taking of property, United States v. Brooklyn Union Gas Co., 168 F. 2d 391 (2nd Cir. 1948) plain-

tiffs' franchise has not been taken. The court properly held the issue of whether the Transit District should have proceeded under that section be left to the Connecticut Courts. (Ruling p. 14).

Sound policy supports the court's abstention. Whether the plaintiffs are entitled in any circumstance to immunity from competition from the Transit District absent a finding of necessity by the PUCA is a complex, unresolved question of state law. Conn. Gen. Stat. §7-273e(a) gives transit districts the power to establish new local transit systems. The section also gives transit districts for purposes of that section the powers of the PUCA as applied to local transit.[3/] This statute arguably eliminates the necessity for a finding of necessity by the PUCA. Cf. Conn. Gen. Stat. §16-320. If a conflict exists between the two statutes the Connecticut Courts are best able to resolve it. Cf. Alabama Public Service Comm'n, supra.

In fact, the district court found that no taking of any part of the plaintiff's franchise had occurred. They are free to continue operations exactly as before. At most, the admittedly limited value of their franchise may have been affected to some degree. Whether that affect, assuming it to

3/ Local Transit Districts may also assume all local PUCA powers under Conn. Gen. Stat- 7-273d. The provision in 7-273e is separate and distinct from this general grant.

be adverse, is compensable under Connecticut law is approximately an issue for Connecticut state judges.4/

4/ The issues raised here have never been the subject of litigation in the Connecticut Courts and are proper subjects for the doctrine of abstention here. See: Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959) (Municipal power to condemn a state law question).

III. THE UMTA GRANT IS VALID

A. The Court Correctly Construed 1602(d) and 1602(e) as Inapplicable to this Type Demonstration Project.

Plaintiff argues that the grant of funds for the demonstration project is invalid because extensive findings required by 49 USC §§ 1602(d) and 1602(e) were not made by either the applicant Transit District or UMTA. We be eve, as the court held, the findings are not necessary, but were in fact made.

Plaintiffs claim the §§ 1602(d) and 1602(e) extensive finding requirement apply to any grant of funds under the act. That argument is deceivingly simplistic and purely semantic. It ignores the obvious intent of the statute expressed as legislative history, conflicting portions of the act, and, if upheld, would render the act unworkable. Plaintiff's bare bones claim is the words "under this act" in § 1602(e) applies to all demonstration grants (Plaintiff's brief, p. 16). Judge Newman carefully reviewed the facts of this case, the legislative history of the act, and considered the language, policy and purposes of the act as a whole in rejecting this claim. (Ruling p. 8, et. seq.) The court stated:

> It is clear from the legislative history of UMTA that Congress wanted to allow considerable flexibility in demonstration projects under the Act. See H. R. Rep. No. 204,

> 88th Cong., 2d Sess. (1964), 1964 U.S. Code Cong. & Admin. News 2569, 2579-80, 2583. Rather than mandating extensive hearings and findings as under other sections of the Act, Congress simply authorized the Secretary 'to request and receive such information or data as he deems appropriate from public or private sources.'

Second, § 1602(d) applies only where the grant or loan is to finance "the acquisition, construction, reconstruction or improvement of facilities or equipment which will substantially affect a community or its mass transportation service." The District Court found as a fact that the project "does not involve more significant committment of resources more substantial impact on the community to bring the hearing and certification requirements of § 1602(d) into play." (Ruling p. 6-7) Mere hopes or expectation of the Transit District to continue the operation after the two year demonstration period do not alter the demonstration character of the grant.[5]

Third, the legislative history and administrative interpretation show sections 1602(d) and 1602(e) are inapplicable to demonstration projects.

The plaintiffs maintain that the District erred in looking into the legislative history and administrative construction of the Act. They contend that statutory

[5]See Township of Ridley v. Blanchette, Civil Action No. 74-2113 (E.D. Pa. Oct. 12, 1976) distinguishing between § 1602 projects and § 1605 demonstration projects (App. Exh. B p. B-238)

construction should begin and end with the plain meaning if the words themselves are clear. In Guiseppi v. Walling, 144 F. 2d 608, 623 (2d Cir. 1944) This Court recognized that the plain meaning of a statute may be the wrong meaning:

> There is no surer way to misread any document than to read it literally; in every interpretation we must pass between Scylla and Charybdis. (L. Hand, J. Concurring)

Accordingly, this Court has repeatedly utilized legislative history in construing statutes. In GAF Corporation v. Milstein, 453 F. 2d 709, 716 (2d Cir. 1971) concerning the Williams Act, the Court pointed out:

> We are well aware of the first catechism of statutory construction which teaches that we should begin the process of interpretation with 'the language of the statute itself,' see Jones v. Alfred H. Mayer Co., 392 U.S. 409, 420, 88 S. Ct. 2186, 20 L. Ed. 2d 1189 (1968); that, however, is toto caelo from saying that the process must end there or that we are required to blind ourselves to other relevant aids to construction, particularly when dealing with a statute as complex as the one before us. The wisdom of Learned Hand guides us again: 'it is one of the surest indexes of a mature and developed jurisprudence . . . to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative

> discovery is the surest guide to their meaning.'

Therefore, it was entirely appropriate and necessary to examine the legislative history and administrative construction of the act.

B. The Legislative History Shows That 1602(d) and 1602(e) Are Inapplicable to Demonstration Projects.

From the time the Act was first considered and passed it has been clear that Congress intended to allow considerable flexibility in § 1605 demonstration projects. See H.R. Rep. No. 204, 88th Cong. 2d Sess. (1964), 1964 U.S. Cong. Code and Admin. News 2569, 2579-80, 2583. Rather than mandating extensive hearings and findings as under other sections of the Act, Congress simply authorized the Secretary to request and receive such information or data as he deems appropriate from public or private services.

Similarly, when enacting the current environmental provision (Sec. 14) Congress limited its effects to programs funded through Section 3 of the Act.:

> (Section 14) . . . replaces the air pollution control requirement in Section 14 of the 1964 Act with a broad declaration of national policy that in planning, designing and constructing projects assisted under Section 3 of the Act . . .
>
> H.R. Report 1585, 91st Cong. 1st Sess. (1969); 1969 U.S. Cong. Code & Admin. News 4102 (emphasis supplied).

When § 1605 (Section 6) was amended in 1968 to allow funding of a wider range of programs, Congress recognized the need for flexibility in developing new solutions to mass transit problems. H. R. Rep. 1257, 90th Cong. 2nd Sess.,1968 U. S. Cong. Code & Admin. News 2940-2941. The House Report stated that extending the range and variety of demonstration programs was vital to solving the nations transportation problems. id.

The Urban Mass Transportation Administration which administers the Act has consistently differentiated between §1602 projects and §1605 demonstration projects. Demonstration projects are exempted by UMTA regulation from review under Office of Management and Budget Revised Circular A-95 on Evaluation Review and Coordination of Federal and Federally Assisted Programs and Projects. 41 Fed. Reg. 10,316 (1976) (to be codified in 49 C.F.R. § 613.300 et. seq.) (App. Pg. B-265).

Section 613.306 (a) (2) (iii) provides:

> Experimental studies or operational tests of techniques or concepts that are as yet unproven and which require further study or demonstration to determine if they should be encouraged on a national scale, undertaken under a Section 6 (§ 1605) Demonstration Grant, are exempt from the requirements of this section.

Similarly, UMTA regulations on comprehensive transportation planning in urban areas do not apply to § 1605 demonstration projects. See 23 C.F.R. § 450.302(a). In light of this administrative construction, it would be inappropriate to apply the § 1602 requirements applicable to a § 1605 demonstration project, since the § 1602 requirements, like the OMB Circular A-95 requirements and comprehensive transportation planning requirements, are safeguards designed to provide more careful control over the more substantial projects under § 1602 rather than over the flexible experimental projects funded under § 1605.

This project is limited to two years duration by the express terms of the UMTA Memorandum of Approval of June 29, 1976. (App. p. B 196 ff.) Its purpose is to study the integration of various types of mass transit services in a suburban setting at a time when the private automobile is an increasingly impractical mode of transportation. (id.) To apply the stringent § 1602 requirements to this project would defeat the legislative purpose of finding new solutions to mass transit problems.

C. Assuming Funding Was Necessary, Defendants Have Complied

Sections 3(d) and 3(e) of the Act (§§ 1602(d) and 1602(e) require certain hearings and findings be made by the applicant and UMTA prior to the approval of a grant or loan. Assuming, arguendo, that they are applicable, defendants have substantially complied. § 1602(d) requires that the applicant:

> (1) has afforded an adequate opportunity for public hearings pursuant to adequate prior notice, and has held such hearings unless no one with a significant economic, social, or environmental interest in the matter requests a hearing;
> (2) has considered the economic and social effects of the project and its impact on the environment; and
> (3) has found that the project is consistent with official plans for the comprehensive development of the urban areas.
> Notice of any hearings under this subsection shall include a concise statement of the proposed project, and shall be published in a newspaper of general circulation in the geographic area to be served. If hearings have been held, a copy of the transcript of the hearings shall be submitted with the application.

The Transit District held numerous public hearings on the proposed demonstration grant. (See Summary App. Pg. B-223). Notice of these hearings was published in a local newspaper, The Westport News (App. Pg. B-220). The plaintiffs had actual notice of the hearings and

an opportunity to be heard. (M.G. 54-55)

Further, the Grant Application of the Transit District contains extensive findings on the economic and social impact and its relation to long term planning in the Westport area. (App. Pg. B-72 ff.) The plaintiffs seize on a technical point in an attempt to halt an innovative experimental project. Though an express "certification" is lacking, the Transit District made all findings necessary to comply with the policy of the Act.

When applicable, §§ 1602(e) requires the Secretary make the following findings prior to giving assistance under the Act:

> (1) the Secretary finds that such assistance is essential to a program, proposed or under active preparation, for a unified or officially coordinated urban transportation system as part of the comprehensively planned development of the urban area, (2) the Secretary finds that such program, to the maximum extent feasible, provides for the participation of private mass transportation companies, (3) just and adequate compensation will be paid to such companies for acquisition of their franchises or property to the extent required by applicable State or local laws, and (4) the Secretary of Labor certifies that such assistance complies with the requirements of section 13(c) of this Act.

Paragraphs (2) and (3) of the Memorandum of Approval dated June 29, 1976 (App. Pg. B-196 ff.) are

an express finding of need. The same paragraphs expressly provide for the substantial participation of private transit operators, which in fact has occurred (although plaintiffs opted out of participation). No property or franchise of the private operators was to be or has been acquired under the terms of the grant. The compensation clause is then inapplicable. Finally, the proper certification was obtained from the Department of Labor. (App. B, p. 208)

The major issue here is whether private operators were included to the "maximum extent feasible." The defendants repeatedly tried to involve the plaintiffs in the program only to meet obdurate refusal. (M.G. 56, 58, 59, 60, Statement of Facts, supra, p. 6) That plaintiffs should claim that maximum feasible participation of private operators was not sought by the Transit District is absurd in the face of the record. The detailed funding provisions were included to provide careful control over extensive projects, not to allow recalcitrant private operators to delay or halt important programs. Thus, Judge Newman's finding of compliance with this provision was adequately supported by the evidence. (Ruling p. 12)

IV. PLAINTIFFS ARE NOT ENTITLED TO INJUNCTIVE RELIEF

Plaintiffs' statutory and constitutional claims are, for reasons previously stated, without merit. The speculative nature of the damages they allege precludes any finding of irreparable harm. In attempting to show the inadequacy of a legal remedy the plaintiffs rely on Semmes Motors Inc. v. Ford Motor Co., 429 F. 2d 1197 (2d Cir. 1970). However, there are critical differences between Semmes and the facts here. There the defendant Ford Motor Co. had already revoked Semmes' dealership. Here, the Transit District has not revoked the plaintiffs' Certificate of Public Convenience and Necessity nor does it intend to in the future. (R.B. 71) One cannot be enjoined from doing what one does not intend to do. Cortwright v. Resor, 447 F 2d. 245, 254 (D.C. Cir. 1974).

Plaintiffs' claim is based on the loss of future profits. Such losses have been held to have an adequate remedy at law. SCM Corp. V. Xerox Corp., 507 F 2d 358 (2d Cir. 1974)(involving damages due to Xerox's domination of the copy machine market); Clune v. Publisher's Association of New York City, 214 F. Supp. 520 (SDNY 1963)(holding that the loss of future wages can be compensated by money damages).

Sampson v. Murray, 415 U.S. 61,88 (1974), at 90 (holding that the Back Pay Act was an adequate remedy for the loss of future wages).

Moreover, as a matter of equity, the request for injunctive relief should be denied. Injunctions are a remedy that is within the discretion of the court and one of the guidelines used is the good faith and conduct of the parties. 7 Moore's Federal Practice, 2nd Ed. Sec. 65.18 (3). The defendant negotiated with the plaintiffs for nearly three years (M.G. 53). Plaintiffs have been given a fair and timely opportunity to participate in the shared ride program but have instead tried to extract more money from the defendant (Ruling p. 12). The hardship here would fall on the defendant and the community it serves, which would be deprived of a new type of transit program. The national program of development of new transit programs would suffer if this project is enjoined. As the defendant has already stated, the intent of Congress in creating demonstration programs was to create new solutions to transit problems. Enjoining such a program would not serve the public interest.

V. CONCLUSION

The Urban Mass Transportation Act and its

legislative history show a clear Congressional intent to allow for the local development of innovative solutions to the transit problems facing urban areas. Revisions to the Act have instituted more flexible criteria for the funding of programs. Similarly, the legislative history shows an intent to provide for the quick and unimpeded implementation of demonstration programs. Naturally, there is concern under the Act for private companies who operate in the area served by UMTA programs. However, this concern was never meant to give private operators veto power over the introduction of new transit programs.

The defendant has shown concern for the interests of the plaintiffs. The defendant offered the plaintiffs an opportunity to enter into a new type of service which may have alleviated some of their pre-existing problems. They chose not to participate. Instead, they carried on their long standing acrimonious dispute with the transit district and the other local taxi operator. Plaintiffs then opted out of any participation. They have no right to be free of competition from the transit district. They do not have standing to sue under UMTA. Any damages they might suffer are remote, speculative, and not

ripe for adjudication. The defendant has never shown any intent to revoke or condemn the plaintiffs' franchise. Plaintiffs have not sustained any kind of injury attributable to the defendants. Defendant's alleged intention to supplant private taxi service in the Westport area is a gross distortion of the realities of the proposed program. Ideally the plaintiffs would have participated in a new type of service while continuing the same service they always have.

The essence of this controversy is not the alleged lack of compliance with UMTA provisions, nor a taking without compensation. The operator of a business in decline due to the changed economic conditions of recent years seeks to "bail out" by having the defendant purchase their business at their highest price. All taxi companies in financial difficulty could do the same if the plaintiffs prevail.

An innovative program is being threatened by parties who could have benefited from it. Because of the lack of a compensable claim by the plaintiffs and their own conduct, the judgment of the district court should be affirmed.

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